Bahruni bin Ismail v Pendakwa Raya

FEDERAL COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05-192-1990
ANUAR, MOHD AZMI FCJJ AND SHAIK DAUD JCA
17 FEBRUARY 1997

Criminal Procedure *— Trial — Close of prosecution's case — Standard of proof — Trial judge applied prima facie test and called upon appellant to enter defence on the trafficking charge — Whether there was a misdirection on the standard of proof — Criminal Procedure Code (FMS Cap 6) s 180*

The appellant was charged and convicted in 1990 for trafficking in 24.88g of heroin in 1985, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and he was sentenced to death. The facts leading to the appellant's arrest and the recovery of the drugs on him were not in dispute. The appellant admitted being in possession of the drugs concerned, but he maintained that it was for personal use and not for trafficking. At the request of the defence, evidence was indeed introduced of the appellant's previous convictions which disclosed that he had three previous convictions for possession of dangerous drugs consistent with his contention that he was a habitual drug user. The main ground of appeal was that the judge erred in not holding that the prosecution was bound by law to prove a case beyond reasonable doubt at the close of the case for the prosecution. The main issue in this appeal was on the standard of proof required of the prosecution at the close of its case, having regard to s 180 of the Criminal Procedure Code (FMS Cap 6) ('the CPC').

Held, allowing the appeal:

(1) The law on the standard of proof required of the prosecution at the close of its case was settled and that was beyond a reasonable doubt.

In the present appeal, at the close of the case for the prosecution, there was evidence before the court of two conflicting versions of the prosecution case: (i) that he was in possession of the drugs for the purpose of trafficking; or (ii) alternatively, that he was in possession of the heroin for his own consumption, sufficient to rebut the presumption of trafficking under s 37(d) of the Act. In such a situation, the prosecution could not be said to have proved its case beyond reasonable doubt, although it might be sufficient to establish a prima facie case. The judge would be correct in law in calling for the defence on the charge of trafficking on the prima facie principle, but not if the law applicable was the beyond reasonable test. It was obvious that the judge applied the standard of proof as interpreted in *Munusamy v PP* [1987] 1 MLJ 492.

Therefore, there was a clear misdirection on the standard of proof and the judge ought not to have called upon the appellant to enter into his defence on the trafficking charge. Thus, the conviction under s 39B(1)(a) of the Act must be quashed (see pp 268I, 269H–270A, 270B and 270F–G); *Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1, *Cohen Lorraine Philis & Anor v PP and another appeal* [1989] 3 MLJ 289 followed and *Munusamy v PP* [1987] 1 MLJ 492 not followed.

(2) Applying the standard of proof of beyond a reasonable doubt, at the close of the case for the prosecution, there were overwhelming evidence of possession of the drug in question, coupled with the admission of the appellant. Therefore, a conviction under s 39A(2)(a) of the Act was substituted (see p 270G–H).

Per curiam:

It was never in doubt that Parliament in its wisdom had not made the amendment to s 180 of the CPC to provide for a prima facie standard of proof at the close of the case for the prosecution retrospective. Therefore, the amendment having been gazetted on 30 January 1997 would for all practical purposes come into effect only on 31 January 1997. Thus, the amendment would only be applicable to cases filed after that date and not to cases before that date and this would include decided cases pending appeal. In all cases before 31 January 1997, the beyond a reasonable doubt standard of proof must of necessity apply as all along there can be only one interpretation of s 180 of the CPC, and that is as decided by the majority decision in *Arulpragasan* (see p 270D–F).

[Bahasa Malaysia summary

Perayu dipertuduhkan dan disabitkan dalam tahun 1990 atas kesalahan pengedaran 24.88g heroin dalam tahun 1985, suatu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') dan dijatuhkan hukuman mati. Fakta-fakta yang membawa kepada tangkapan perayu dan dadah yang dijumpai atasnya tidak dipertikaikan. Perayu mengakui memiliki dadah berkenaan, tetapi berkeras bahawa ianya adalah untuk penggunaan sendiri dan bukan untuk pengedaran. Atas permintaan pembelaan, bukti dikemukakan atas sabitan terdahulu perayu yang mendedahkan bahawa dia mempunyai tiga sabitan terdahulu untuk milikan dadah berbahaya yang konsisten dengan hujahnya bahawa dia adalah seorang pengguna dadah. Alasan rayuan yang utama adalah bahawa hakim telah melakukan kesilapan dalam tidak memutuskan bahawa pihak pendakwa adalah wajib dari segi undang-undang untuk membuktikan kes melampaui keraguan munasabah di penutup kes pihak pendakwa. Isu utama dalam rayuan ini adalah atas darjah bukti yang dikehendaki daripada pihak pendakwa di penutup kesnya, memandangkan s 180 Kanun Acara Jenayah (NMB Bab 6) ('KAJ').

Diputuskan, membenarkan rayuan:

(1) Undang-undang mengenai darjah bukti yang dikehendaki daripada pihak pendakwa di penutup kesnya adalah mantap iaitu melampaui keraguan munasabah.

Dalam rayuan ini, di penutup kes pendakwa, terdapat bukti di hadapan mahkamah atas dua cerita yang bertentangan tentang kes pihak pendakwa: (i) bahawa dia memiliki dadah untuk tujuan pengedaran; atau (ii) sebagai alternatif, bahawa dia memiliki heroin untuk penggunaan sendiri, yang mencukupi bagi mematahkan anggapan pengedaran di bawah s 37(d) Akta tersebut. Dalam keadaan sedemikian, pihak pendakwa tidak boleh dikatakan telah membuktikan kesnya melampaui keraguan munasabah, walaupun ia mungkin mencukupi untuk mewujudkan kes prima facie. Hakim adalah betul dari segi undang-undang dalam memanggil pembelaan atas pertuduhan pengedaran atas prinsip prima facie, tetapi ianya bukan begitu jika undang-undang yang terpakai adalah ujian melampaui keraguan munasabah. Adalah jelas bahawa hakim telah memakai darjah bukti seperti yang ditafsirkan dalam *Munusamy v PP* [1987] 1 MLJ 492.

Oleh itu, terdapat salah arah yang nyata atas darjah bukti dan hakim sepatutnya tidak memanggil perayu memasukkan pembelaan atas pertuduhan pengedaran. Justeru itu, sabitan di bawah s 39B(1)(a) Akta tersebut mestilah dibatalkan (lihat ms 268I, 269H–270A, 270B dan 270F–G); *Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1, *Cohen Lorraine Philis & Anor v PP and another appeal* [1989] 3 MLJ 289 diikut dan *Munusamy v PP* [1987] 1 MLJ 492 tidak diikut.

(2) Dengan memakai darjah bukti melampaui keraguan munasabah, di penutup kes pihak pendakwa, terdapat bukti yang ketara tentang milikan dadah berkenaan, bersama dengan pengakuan perayu. Oleh itu, satu sabitan di bawah s 39A(2)(a) Akta tersebut diganti (lihat ms 270G–H).

Per curiam:

Ia tidak sekali-kali diragukan bahawa Parlimen dalam kebijaksanaannya telah tidak membuat pindaan kepada s 180 KAJ untuk memperuntukkan suatu darjah membukti prima facie di penutup kes pihak pendakwa secara kebelakangan. Oleh yang demikian, pindaan yang diwartakan pada 30 Januari 1997 untuk semua tujuan praktikal mula berkuatkuasa hanya pada 31 Januari 1997. Justeru itu, pindaan hanya terpakai kepada kes-kes yang difailkan selepas tarikh itu dan bukan kepada kes-kes sebelum tarikh itu dan ini termasuk kes-kes yang diputuskan sementara menunggu rayuan. Dalam semua kes sebelum 31 Januari 1997, darjah membukti melampaui keraguan munasabah mestilah terpakai sebab selama ini hanya terdapat satu tafsiran s 180 KAJ, dan ini adalah yang ditentukan oleh keputusan majoriti dalam *Arulpragasan* (lihat ms 270D–F).]

Notes

For cases on the close of the prosecution's case, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2899–2915.

Cases referred to

Arulpragasan a/l Sandaraju v PP [1997] 1 MLJ 1 (folld)
Cohen Lorraine Philis & Anor v PP and another appeal [1989] 3 MLJ 289 (folld)
Munusamy v PP [1987] 1 MLJ 492 (not folld)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 180
Dangerous Drugs Act 1952 ss 37(d), 39A(2)(a), 39B(1)(a)

Appeal from: Criminal Trial No 58–2–1986 (High Court, Johor Bahru)

Gurbachan Singh (*Bachan & Kartar*) for the appellant.
Mohd Yusoff bin Zainal Abidin (Timbalan Pendakwa Raya, Jabatan Peguam Negara) for the respondent.

Shaik Daud JCA (delivering the judgment of the court): The appellant was charged in the Johor Bahru High Court and convicted on 4 November 1990 for trafficking in 24.88 grammes of heroin on 14 April 1985, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and he was sentenced to death. The facts leading to the appellant's arrest and the recovery of the drugs on him are not in dispute. In fact, the appellant admitted being in possession of the drugs concerned, but he maintained that it was for personal use and not for trafficking. At the request of the defence, evidence was indeed introduced through Inspector Kamaluddin bin Kassim (PW5) of the appellant's previous convictions, marked as exh P5 which disclosed that he had three previous convictions for possession of dangerous drugs, including morphine between 1976 to 1984, consistent with his contention that he was a habitual drug user. The main ground of appeal is that the learned judge erred in not holding that the prosecution was bound by law to prove a case beyond reasonable doubt at the close of the case for the prosecution. In other words, the main issue in this appeal is on the standard of proof required of the prosecution at the close of its case, having regard to s 180 of the Criminal Procedure Code ('the CPC').

The offence was committed in 1985 and the trial concluded in 1990. What, therefore, is the law applicable to the instant case, on the standard of proof required of the prosecution at the close of its case? Without the necessity of embarking into the history on this issue all over again, suffice for us to hold that in the light of the recent decision in the *Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1, the law on the standard of proof required of the prosecution at the close of its case is finally settled and that

A is beyond a reasonable doubt. We need only cite one passage in the majority judgment of Eusoff Chin CJ at p 12:

> It is trite law that the onus is on the prosecution throughout the case in any criminal trial to prove the charge against the accused beyond reasonable doubt. In my view, the same standard of proof applies at the intermediate
B stage of the trial, ie at the close of the prosecution.

Whatever our personal sentiments may be on this issue, we are bound by the decision in the *Arulpragasan*'s case. What is the difference between a prima facie case and a beyond reasonable doubt case? The distinction has been illustrated in the judgment of Edgar Joseph Jr FCJ in *Arulpragasan a/l Sandaraju v PP* at pp 41–42 [1997] 1 MLJ 41 in the following words:
C

> Having regard to the principles enunciated in the above authorities and the article by Glass J, the following two examples will help to illustrate the difference between applying 'the prima facie case' and 'the beyond all reasonable doubt' test in the prosecution's evidence at the conclusion of its case.
D
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> Take a case where the prosecution's evidence points to two likely inferences, one consistent with guilt, the other with innocence. In such situation, if the standard of proof is that of a mere 'prima facie case', in other words 'a prima facie supposition that the accused may be guilty', then the trial ought to proceed and the defence would have to be called (see
E *Karam Singh v PP* [1967] 2 MLJ 25 (at p 30, per Ong Hock Thye FJ)).
>
> If, on the other hand, the standard of proof is 'beyond reasonable doubt', then in the situation just mentioned, the prosecution will have failed to satisfy the test, and the accused would have to be acquitted and discharged without his defence being called.
>
> Another example which helps to further illustrate the point that there is
F a fundamental difference between applying a mere 'prima facie' standard of proof and the 'beyond all reasonable doubt standard of proof', at the intermediate stage of the trial, would be where, at the conclusion of the prosecution's case, there is strong prosecution evidence but there remains a reasonable tenable doubt. In such a situation, if the standard of proof is a mere 'prima facie case', in other words, a mere prima facie supposition that
G the accused may be guilty, then also the trial must proceed, and the defence would have to be called. On the other hand, if the standard of proof is 'beyond all reasonable doubt', then, in the situation just mentioned, the prosecution will have failed to satisfy the test, and the accused would have to be acquitted and discharged without his defence being called.

H In the present appeal, at the close of the case for the prosecution, there was already evidence before the court of two conflicting versions of the prosecution case: that he was in possession of the drugs for the purpose of trafficking, or alternatively, that he was in possession of the heroin for his own consumption as in the case of *Cohen Lorraine Philis & Anor v PP and another appeal* [1989] 3 MLJ 289, sufficient to rebut the presumption of
I trafficking under s 37(d) of the Act. In such a situation, the prosecution could not be said to have proved its case beyond reasonable doubt, although it might be sufficient to establish a prima facie case. The learned trial judge would be correct in law in calling for the defence on the charge

of trafficking on the prima facie principle, but not if the law applicable is the beyond reasonable test as enunciated in *Arulpragasan*. A

At the close of the case for the prosecution in the instant case, although the learned judge had not expressed in so many words, it is obvious to us that he applied the standard of proof as interpreted in *Munusamy v PP* [1987] 1 MLJ 492. At that time, the interpretation of s 180 of the CPC was as decided in that case. Following that decision, the standard of proof was the prima facie standard. The learned judge cannot be faulted for this as at that time that was the only interpretation of s 180 of the CPC. We now agree with the submission of counsel for the appellant, as conceded to by the learned DPP, that in view of the majority decision in *Arulpragasan*, it must be taken that the interpretation of s 180 all along ought to have been the beyond reasonable doubt standard and not the prima facie standard. B C

While we appreciate that s 180 of the CPC has now been amended to provide for a prima facie standard of proof at the close of the case for the prosecution, it cannot be gainsaid that that amendment has no retrospective effect. There is nothing in the amendment itself to even suggest this. Therefore, it is never in doubt that Parliament in its wisdom has not made it retrospective. Both the learned DPP and the learned counsel for the appellant conceded this. Therefore, the amendment having been gazetted on 30 January 1997 would for all practical purposes come into effect only on 31 January 1997. Thus, the amendment would only be applicable to cases filed after that date and not to cases before that date and this would include decided cases pending appeal. In all cases before 31 January 1997, the beyond a reasonable doubt standard of proof must of necessity apply as all along there can be only one interpretation of s 180 of the CPC, and that is as decided by the majority decision in *Arulpragasan*. D E F

We, therefore, hold that in the instant case, there was a clear misdirection on the standard of proof and the learned judge ought not to have called upon the appellant to enter into his defence on the trafficking charge. We would allow the appeal, quash the conviction under s 39B(1)(a) of the Act, and accordingly set aside the death sentence. G

We find that applying the standard of proof of beyond a reasonable doubt at the close of the case for the prosecution, there were overwhelming evidence of possession of the drug in question, coupled with the admission of the appellant. We, therefore, substitute a conviction under s 39A(2)(a) of the Act. After considering the plea in mitigation from learned counsel for the appellant, we sentenced the appellant to 15 years imprisonment with effect from his date of arrest plus 10 strokes of the rotan. H

Appeal allowed.

Reported by Jafisah Jaafar I